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IN THE

SUPREME COURT OF THE UNITED STATES.

THE ARKANSAS CORPORATION COMMISSION and FIFTY-ONE COUNTY TAX COLLECTORS OF ARKANSAS,
Petitioners,

vs.

GUY A. THOMPSON, as Trustee of MISSOURI PACIFIC RAILROAD COMPANY, Debtor,
Respondent.

No. 715.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

THE ARKANSAS CORPORATION COMMISSION and FIFTY-ONE COUNTY TAX COLLECTORS OF ARKANSAS, Petitioners, vs. GUY A. THOMPSON, as Trustee of MISSOURI PACIFIC RAILROAD COMPANY, Debtor, Respondent.	No. 715.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT.

As will appear from the transcript, petitioners are seeking certiorari to the Circuit Court of Appeals for the Eighth Circuit to review a judgment of that Court affirming an **interlocutory order** of the District Court of the United States for the Eastern District of Missouri overruling a motion filed by the Arkansas Corporation Commission, on behalf of itself and the County Collectors, to dismiss a petition filed in said District Court by Guy A. Thompson, Trustee of Missouri Pacific Railroad Company, Debtor, in which said Trustee prayed said Court to hear and determine the amount and legality of taxes assessed against Trustee's property in the State of Arkansas for the year 1939.

As stated in the petition herein, the Missouri Pacific Railroad Company was, and is, under reorganization in a proceeding previously filed in said District Court, under the provisions of Section 77 of the amended Bankruptcy Act, and Guy A. Thompson was and is the duly appointed and qualified trustee in said proceeding.

On April 11, 1940, said Trustee filed in said District Court a petition alleging that certain questions had arisen with respect to taxes for the year 1939 assessed against the property of the trust estate in the State of Arkansas and prays said Court to hear and determine the amount and legality of said taxes, under the provisions of Section 64 of the Federal Bankruptcy Act.

The Trustee's petition alleges that the taxes assessed against his property in Arkansas are excessive and illegal in several particulars, viz.:

1. In paragraph 4 (R. 7), that the Statutes of Arkansas require all property assessed by the Arkansas Corporation Commission, including railroad property, to be assessed on the basis of its fair market value, i. e. (Section 2044, Pope's Digest of Arkansas Statutes, 1937), "upon the consideration of what a clear fee simple title thereto would sell for under conditions under which that character of property is usually sold," but that (paragraph 2, R. 9) the assessment set by the Arkansas Corporation Commission upon Trustee's properties in that State, in the sum of $28,050,000, was (paragraph 10, R. 13) greatly in excess of a maximum proper assessment thereof for said year 1939, which should not exceed the sum of $16,830,000.

The petition further alleged, in paragraphs 8 and 9 (R. 11-13) that said excessive assessment was due to the use by the Arkansas Corporation Commission of improper methods in arriving at the System value of the Trustee's

property in that too great weight was ascribed to original cost and to cost of reproduction of the property, and to an indefinite factor described as Gross Revenue, the source of which could not be determined and inadequate weight to market value of stocks and bonds and to capitalized net earnings, thereby ignoring the general collapse of values which has taken place in all properties, including railroad properties, since 1929, and also ignoring the virtual collapse of railroad values due to increased carrier competition (paragraph 13a, R. 17).

The foregoing allegations of a violation in the assessment of the requirement of the Arkansas statute that railroad property be assessed upon the basis of its true market value, although making up by far the greatest part of the Trustee's petition, are wholly ignored in the "Summary Statement of the Case" in the Petition for Writ of Certiorari filed herein.

2. The petition alleges (paragraph 13b, R. 18) that the assessment was in violation of Section 5 of Article XVI of the Constitution of Arkansas, which provides that all property shall be taxed according to its value and that no one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, and that all values shall be ascertained so as to make same equal and uniform throughout the State, and also

3, in paragraph 13 (b) (R. 18), that by reason of arbitrary discrimination, over a long period, and assessment of the Trustee's properties for 1939 and for many years prior thereto at more than their full and actual value, after giving consideration to an equalization factor of the same amount as that applied to other classes of property in the State, there was imposed upon the Trustee so undue and disproportionate a share of the taxes in said State as

to amount to a constructive fraud and to deprive the Trustee of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The Trustee's petition also prayed, in paragraph 14 (R. 19), that he be authorized to pay or to tender payment to the several County Collectors of taxes in amount conceded to be due under a proper assessment, amounting to $620,-645.03, and that the Court proceed, without unnecessary delay, to determine the legality of the taxes in dispute, amounting to $416,043.17, and that pending such determination he be authorized to withhold payment of said amount in dispute.

Upon the filing of the Trustee's petition, the District Court, on April 11, 1940, entered its order (R. 20-25) assigning the case for hearing on May 3, 1940, and directing the manner in which notice should be given to the Attorney-General for the State of Arkansas, to each member of the Arkansas Corporation Commission, and to each of the County Collectors of the fifty-one Counties in Arkansas in which taxes against the property of the Trustee had been levied for the year 1939.

The order also authorized the Trustee to pay the amount of taxes conceded to be due for 1939 ($620,045.03), on the installment dates as provided in the Arkansas statute, and to withhold payment of any additional taxes for said year, based on the assessment made by the Arkansas Corporation Commission, pending the determination by the Court of the amount and legality thereof.

No appearance was made on May 3, 1940, the return day fixed in the Court's order, but on July 5, 1940, the Arkansas Corporation Commission, on behalf of itself and the fifty-one Tax Collectors, filed a motion to dissolve the Court's order of April 11, 1940, and to dismiss the Trustee's petition (R. 25-34).

The grounds as set forth in said motion were generally the same as those asserted in the petition for writ of certiorari now before this Court, except that an additional ground asserted in their original motion in the District Court, that the Trustee's petition failed to allege that he had exhausted his administrative remedy before seeking judicial relief (R. 32) has since been abandoned.

Following oral argument upon said motion and submission of briefs, the District Court, on September 24, 1940, entered its order overruling said motion (R. 40), accompanied by an opinion (R. 34-39).

The District Court therein expressed no opinion upon the merits of the case, other than that the Trustee's petition presented a justiciable controversy.

Before any order of reference was made, or any other action taken by the District Court, the Arkansas Corporation Commission and the fifty-one County Collectors prosecuted an appeal to the United States Circuit Court of Appeals for the Eighth Circuit. On January 3, 1941, that Court entered its judgment affirming the interlocutory order of the District Court (R. 51-52), accompanied by an opinion (R. 44-51).

In the present petition for writ of certiorari, petitioners seek review of said judgment of the Court of Appeals.

At page 3 of their petition, under "Summary Statement of the Case," Counsel for Petitioners refer to the provisions of Section 2044 of the Arkansas Statutes (Pope's Digest, 1937). The reference is incomplete and decidedly misleading, and because this section has an important bearing upon the method prescribed by the Arkansas Statute for determining the true market value of the property, we quote said section in full, as follows:

> "Section 2044. VALUATION; EVIDENCE. The valuation of the property of all persons, firms, companies, co-partnerships, associations and corporations

required by law to be assessed by the Commission shall be made upon the consideration of what a clear fee simple title thereto would sell for under conditions under which that character of property is usually sold. As evidence tending to show what this would be the Commission, in so far as other evidence and information in its possession does not make it appear improper or unjust for it to do so, shall ascertain as nearly as it can and consider the market or actual value of all outstanding capital stock and funded debt and the income of such companies, and also the estimated investments and valuation of said property as set up by the officers or agents of such companies as a basis for the adjustment of rates or charges for service to the public by such companies, and such other information as to value the Commission may obtain."

It will be observed that Counsel for Petitioners omit entirely the provision of the statute that the Commission, **"in so far as other evidence and information in its possession does not make it appear improper or unjust for it to do so,** shall ascertain as nearly as it can and consider * * *" (among other things) "the estimated investments and valuation of said property as set up by the officers or agents of such companies as a basis for the adjustment of rates or charges for service * * *."

Paragraph 13 (a) of the Trustee's petition alleges that the general business conditions, the material reduction in value of all classes of property and the virtual collapse of values of railroad properties due to increased competition, which rendered orginal cost of the railroad property an improper determinant of the true market value thereof, were well known to the Corporation Commission.

POINTS AND AUTHORITIES.

A. The petition for certiorari should be denied because the grounds therefor, as set forth in the petition, are without merit.

It will be observed that the argument, in the Brief in support of the writ, does not at all follow the order of the "Statement of Questions Presented," as set forth at page 8 of the Petition for Writ of Certiorari. We will follow the order of the latter.

1. The power conferred on courts of bankruptcy by Section 64a (11 U. S. C. A. 104) applies to taxes which accrue during the pendency of the proceeding as well as to taxes which accrued against the bankrupt prior to its adjudication as a debtor.

Prior to the amendment of the Bankruptcy Act, by the Act of June 22, 1938, it has been repeatedly held that Section 64a applies to taxes accruing while the Trustee was in possession, as well as to taxes accruing prior to the adjudication.

> *Henderson County v. Wilkins*, 43 Fed. (2nd) 670;
> *Dickinson v. Riley*, 86 Fed. (2nd) 385;
> *Board of Directors of St. Francis Levee District v. Kurn*, 91 Fed. (2nd) 118 (Certiorari denied, 302 U. S. 750);
> *Board of Directors of St. Francis Levee District v. Kurn*, 98 Fed. (2nd) 394 (Certiorari denied, 305 U. S. 647).

The Amendment of the Bankruptcy Act, by the Act of June 22, 1938, does not change the classification of taxes accruing during the Trustee's possession as part of the cost and expense of administration. Consequently the cases above cited apply with equal force to taxes accruing

after the effective date of the 1938 Amendment and during the Trustee's possession.

And Section 64a, as same appears in the 1938 Amendment, specifically provides that "in case any question arises as to the amount or legality **of any taxes**, such question shall be heard and determined by the Court" (meaning the Bankruptcy Court). 52 *Stat.* 874.

> "Where a statute that has been construed by the courts of last resort has been re-enacted in same, or substantially the same, terms, the legislature is presumed to have been familiar with the construction, and to have adopted it as a part of the law, unless a contrary intent clearly appears or a different construction is expressly provided for."
>
> 59 *Corpus Juris, "Statutes,"* Sec. 625, pages 1061-1063;
> *Heald v. District of Columbia*, 254 U. S. 20, l. c. 23;
> *Johnson v. Manhattan Ry. Co.*, 289 U. S. 479, l. c. 500.

2. Section 64a of the Bankruptcy Act is a part of Section 77 of that Act and is applicable to a railroad reorganization proceeding.

Bankruptcy Act, Section 64a, 52 Stat., page 874;
Bankruptcy Act, Section 77, paragraph (1), 49 Stat., page 922;
Bankruptcy Act, Chapter X, Section 102, 52 Stat., page 883;
Continental Illinois National Bank & Trust Co. v. C. R. I. & P. Ry. Co., 294 U. S. 648;
Board of Directors of St. Francis Levee District v. Kurn, 91 Fed. (2nd) 118 (Certiorari denied, 302 U. S. 750);
Board of Directors of St. Francis Levee District v. Kurn, 98 Fed. (2nd) 394 (Certiorari denied, 305 U. S. 647).

3. An appeal to the Bankruptcy Court to hear and determine the amount or legality of the disputed taxes, under the provisions of Section 64a of the Bankruptcy Act, such as the petition of the Trustee in the present proceeding, is not prohibited by Section 24 of the Judicial Code as amended (28 U. S. C. A. 41).

The Trustee's petition does not ask an injunction, nor does the order of the District Court enjoin the State taxing authorities in any respect whatever.

Henderson County v. Wilkins, 43 Fed. (2nd) 670.

Jurisdiction, in the appeal to the Bankruptcy Court to hear and determine the amount or legality of the disputed taxes is not based upon any of the grounds specified in Section 24 of the Judicial Code, but is based upon Section 64a of the Bankruptcy Act.

Even though an adequate remedy might be provided in the State Courts (which is denied) "the Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, State of Federal, can exercise over the person and property of a debtor, who duly invokes the bankruptcy law."

Kalb v. Feuerstein, 308 U. S. 433;
New York v. Irving Trust Co., 288 U. S. 329;
Ex Parte Baldwin, 291 U. S. 610.

4. The petition of the Trustee as filed in the Bankruptcy Court presents a justiciable controversy.

It alleges that the assessment made by the Arkansas Commission is based upon a value of the System greatly in excess of the true market value thereof and, therefore, in violation of the Arkansas Statutes.

Sections 2044 and 2048, *Pope's Digest of Arkansas Statutes*, 1937;
Henderson County v. Wilkins, 43 Fed. (2nd) 670, l. c. 671;

In re Gustav Schaefer Co., 103 Fed. (2nd) 237, l. c. 241;

Board of Directors of St. Francis Levee District v. Kurn, 98 Fed. (2nd) 394, l. c. 397.

It alleges that the assessment is in violation of the uniformity clause of the Constitution of Arkansas.

Article XVI, Section 5, Arkansas Constitution;

Dawson v. Kentucky Distilleries and Warehouse Co., 255 U. S. 288.

It alleges that the over-assessment of Trustee's properties in Arkansas has been persistent and material, and has imposed upon the Trustee so undue and disproportionate a share of the taxes in said State as to amount to a constructive fraud and to deprive the Trustee of his property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Kansas City Southern Ry. Co. v. Road Improvement District No. 6, 256 U. S. 658;

Road Improvement District No. 1 v. Missouri Pacific Railroad Co., 274 U. S. 188.

B. The petition for certiorari should be denied because the granting of such writ is solely a matter of sound judicial discretion and the facts presented do not bring this case within the classes of cases calling for the exercise of such discretion, as set forth in paragraph 5 of Rule 38 of the Rules of this Court.

Furthermore, the decision of the United States Circuit Court of Appeals merely affirms an interlocutory order of the District Court, and, except in extraordinary cases, this writ will not be issued until final decree.

American Construction Co. v. Jacksonville, Tampa and Key West Railway Co., 148 U. S. 372;

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, l. c. 259.

ARGUMENT.

A. 1. The Power Conferred on Courts of Bankruptcy by Section 64a (11 U. S. C. A. 104) Applies to Taxes Which Accrue During the Pendency of the Proceeding as Well as to Taxes Which Accrued Against the Bankrupt Prior to Adjudication.

This is in reply to point (1) in "Statement of the Questions presented," on page 8 of the Petition for Certiorari. Petitioners' argument on this question is presented under heading 4, at pages 12-14 of the brief filed in support of their petition.

With respect to the case of *Hennepin County v. Savage*, 83 Fed. (2nd) 453, cited at page 12 of Petitioners' brief, it will be observed that the question at issue was solely the obligation of the Trustee to pay, as cost of administration, taxes which had accrued upon property which the Trustee had used and occupied during the time he held same, and for which he had paid no rental, nor had he paid interest upon a mortgage upon the property. When he had no further use of the property, after having occupied same for several years, the Trustee alleged that the estate had no equity in the property and sought to escape payment of taxes which had accrued during his occupancy, under another provision of Section 64a, "that no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the Court." The mortgagee in the Savage case asked the Court to order the Trustee to secure release of the lien for the taxes, on property so occupied, which had accrued during the Trustee's occupancy. No question as to the amount of these taxes was involved at all, nor did either of these cases involve the provision of Section 64a

that "in case any question arises as to the amount or legality of any tax, such question shall be heard and determined by the Court." Manifestly, this decision has no bearing whatever upon the question now at issue. The Court held that "to escape the obligation to pay such taxes, a receiver must, within a reasonable time, repudiate the property as a burden upon the estate. He cannot accept the benefits and escape the burdens of operation."

The case of *Boteler v. Ingels,* 308 U. S. 57, cited at pages 13-14 of Petitioners' brief, involved a claim for penalties against the Trustee of a bankrupt creamery company for operating delivery trucks over the public highways without obtaining automobile license therefor within the period required by the State statute. The Trustee claimed exemption from liability for penalties by reason of Section 57j of the Bankruptcy Act. Section 57, in its entirety, relates to the proof and allowance of claims accruing against the bankrupt prior to adjudication, and the Court of Appeals for the Ninth Circuit held that paragraph j of this section did not exempt the trustee from penalties due from such trustee by reason of his having operated the trucks without a license, and further, that under the provisions of section 124a of the Judicial Code (48 Stat. 993, 28 U. S. C. A. 124a) the trustee was liable for all State and local taxes applicable to the business being conducted by the trustee the same as if such business were conducted by an individual or corporation. *Ingels v. Boteler,* 100 Fed. (2nd) 915. This holding by the Court of Appeals was in all respects affirmed by this Court.

In the case at bar there is no question as to the exemption of the Trustee from any taxes which would be due from the corporation—the sole question before the Court being whether the Bankruptcy Court is the proper tribunal to hear and determine the amount or legality of taxes

which are alleged to have been assessed improperly, in violation of the Constitution and of the Statutes of the State.

Section 64a of the Bankruptcy Act, in reliance upon which the Trustee originally filed his petition in the District Court, provides for the classification not only of claims accruing prior to the bankrupt's adjudication but also of claims against the Trustee—Class (1) of Section 64a being "the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition, * * *."

Counsel for petitioners argue, at page 13 of their brief, that "under the decision here, taxes which are operating expenses are no longer in a class of operating expenses but deferred to the fourth priority, * * *." In this statement, Counsel for petitioners are in error. Class (4) of Section 64a specifically refers to "taxes legally due and owing by the bankrupt" and it is our own view that taxes accruing while the Trustee is in possession of the property should be classed as a part of the necessary cost and expense of preserving the estate and, therefore, as a part of Class (1). This would appear to be the only possible conclusion from the language used by Mr. Justice Cardozo, in *Michigan v. Michigan Trust Co.*, 286 U. S. 334, at page 344, that "the annual taxes accruing while the receiver was in charge must be deemed expenses of administration and, therefore, charges to be satisfied in preference to the claims of general creditors."

But the fact remains that the claims in dispute are **for taxes**, and Section 64a specifically provides that "in case any question arises as to the amount or legality of **any taxes**, such question shall be heard and determined by the Court"—and "the Court" has, in numerous cases, been held to mean the Bankruptcy Court. That Court finally

passes upon other claims for administration expense incident to the preservation of the estate, and, even apart from the express mandate of Section 64a, as above quoted, there is no reason to make an exception of disputed tax claims.

Prior to the amendment of the Bankruptcy Act by the Act of June 22, 1938 (52 Stat. 874), it had been repeatedly held that Section 64a, as it appeared in the former act (U. S. C. A., Title 11, Sec. 104) applied to taxes accruing while the Trustee was in possession, as well as to taxes accruing prior to the adjudication.

Thus, in *Henderson County, N. C., v. Wilkins*, 43 Fed. (2nd) 670, a decision by the Court of Appeals for the Fourth Circuit, the trustee in bankruptcy had complained of the assessed value, for ad valorem taxes, of a hotel property in his hands, and had petitioned the bankruptcy court to reduce same. The taxing authorities had assessed the property for taxation at a valuation of $250,000. The valuation was reduced, upon a hearing before the referee in bankruptcy, to $110,000.00, and the findings of the referee were approved and confirmed by the Bankruptcy Court. The action was affirmed, on appeal, by the Circuit Court of Appeals. In the opinion of that Court it is said (page 671):

> "The first question raised by appellants is as to the power of the bankruptcy court to reduce the taxes assessed against the property in the hands of the trustee by the taxing officials of the county and municipality. We think, however, that there can be no doubt that the court has this power."

The opinion then quotes Section 64a of the Bankruptcy Act and proceeds as follows:

> "Although the property in question was in the hands of the bankruptcy court when the taxes for

1927 and 1928 were levied, it was subject to taxation by the authorities of the county and municipality. Swarts v. Hammer, 194 U. S. 441, 24 S. Ct. 695, 48 L. Ed. 1060; Dayton v. Stanard, 241 U. S. 588, 36 S. Ct. 695, 60 L. Ed. 1190. It was the duty of the county and municipal authorities, however, to tax it according to its true value in money. Constitution of N. C., Article V, Sec. 3; Code 1927, North Carolina, Sec. 7971 (46). And, when a question arose as to whether it had been properly valued for purposes of taxation or not, this was a matter for the determination of the bankruptcy court under the statute quoted above, as the question involved was one as to the amount of the tax to be paid from the estate. It is well settled that in determining such a question the court is not concluded by the findings of the taxing authorities. New Jersey v. Anderson, 203 U. S. 483, 493, 27 S. Ct. 137, 141, 51 L. Ed. 284; Truman, Treas., v. Thalheimer (C. C. A. 9th), 19 F. (2nd) 468; In re Sheipman (D. C.), 14 F. (2d) 323; In re Simcox (D. C.), 243 F. 479; In re United Five and Ten Cent Store (D. C.), 242 F. 1005. Its action is not a review of the action of the taxing authorities or a proceeding to enjoin action by them, but a determination under the statute of the amount which should be paid for taxes from the assets of the estate in its possession. In re E. C. Fisher Corporation (D. C.), 229 F. 316, 318."

And in *Dickinson v. Riley*, 86 Fed. (2nd) 385, there had been an adjudication of bankruptcy on January 8, 1932. The tax claims in controversy covered taxes for the years 1929-1933, inclusive, including two years during which the trustee was in charge of the property. The taxing authorities contended that the court of bankruptcy had no power or jurisdiction to go into the question of excessive valuation of the property taxed. While sustaining the original assessment, under the evidence in that case, the Court of Appeals held that the great weight of authority was in favor of the right of the bankruptcy court, by rea-

son of the provisions of Section 64a, to hear and determine whether the value at which the property was assessed was the proper and correct value as provided by the taxing statutes of the sovereignties or public entities which assessed and levied the taxes.

In *Board of Directors of St. Francis Levee District v. Kurn*, 91 Fed. (2nd) 118, the taxes involved were levied subsequent to the appointment of the trustees in a reorganization case under Section 77. The Bankruptcy Court had directed the trustees to apply for injunction, in the Federal Court in Arkansas, against the prosecution of several suits filed by the Levee District for the recovery of taxes claimed by it, in the State Courts in Arkansas. Interlocutory injunction was granted by the United States District Court in Arkansas and upon appeal said order was affirmed by the United States Court of Appeals for the Eighth Circuit. In its opinion in this case the Court of Appeals say (at page 120 of opinion): "The question of the amount and validity of the levee tax liens must be submitted to the bankruptcy court and settled by it."

The case last cited was decided by the Circuit Court of Appeals on June 28, 1937. On November 22, 1937, petition for certiorari in that case was denied by this Court. 302 U. S. 750, No. 543.

And in *Board of Directors of St. Francis Levee District v. Kurn*, 98 Fed. (2nd) 394, there was involved the same taxes as were at issue in the previous case of this same name (last cited) together with some additional taxes which had accrued while that case was pending. The Bankruptcy Court (United States District Court for the Eastern District of Missouri) had issued a bar order requiring the levee district board to present its claims for the taxes in question to that Court, in Missouri, within a reasonable time or be forever barred. Upon appeal, the

order of the District Court was in all respects sustained by the Court of Appeals, which said, **98 Fed. (2nd), at page 397:**

> "We think the issuance of its bar order by the Bankruptcy Court was the appropriate procedure to call upon the St. Francis Levee District to appear before the court and assert its rights by reason of its levy and assessment of levee taxes against the property then within the Court's exclusive jurisdiction."

In the case last cited, the precise contention which Petitioners are now asserting was urged upon the Court of Appeals. At page 27 of their brief in that case, Counsel for the St. Francis Levee District say:

> "The taxes were not 'due and owing by the bankrupt.' They had not been levied or assessed at the time of the approval of the petition for reorganization proceedings. They were assessed at the instance of the trustees two years after their appointment.
>
> "That the section quoted has no application to taxes levied and assessed and becoming due during the management of the bankrupt's property by the trustees seems to be established by prior decisions of this court."

But the decision of the Court was adverse to this contention.

The decision in this second St. Francis Levee District case was rendered on July 19, 1938. Certiorari was denied by this Court on November 14, 1938. **305 U. S. 647 (No. 415).**

Now, all of the decisions above cited, excepting only that of the Circuit Court of Appeals in the second St. Francis Levee District case, were rendered prior to the amendment of the Bankruptcy Act, approved on June 22, 1938. **52 Stat., pages 840-940.** And in this amending Act,

Section 64 was re-enacted in a form which, we submit, makes it even clearer than was true under the prior Act that Congress intended to vest in the Bankruptcy Courts the exclusive right to hear and determine the amount or legality of all taxes levied upon property being administered under their jurisdiction—whenever any question might arise in regard thereto, regardless of whether such taxes may have accrued prior to the adjudication, or subsequent thereto.

We say that the amending Act of June 22, 1938, makes this even clearer than the prior Act because the latter (11 U. S. C. A. 104) provided as follows:

> "(Section 64) (a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof; provided, that no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustee shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

And then sets forth, in paragraph (b), "the debts to have priority, in advance of the payment of dividends to creditors and to be paid in full out of bankrupt estates, and the order of payment," including, as Class (6), "taxes payable under paragraph (a) hereof."

As the prior act was worded there was room for a possible argument that Congress only intended to include in the taxes, the amount or legality of which, when questioned, should be heard and determined by the Bank-

ruptcy Court, taxes assessed against the bankrupt, and not taxes assessed against the trustee. However, as above pointed out, the Courts held that both were included.

Now, in the amended Act of June 22, 1938 (52 Stat., at page 874), paragraphs (a) and (b) of section 64, as it appeared in the prior Act, are consolidated, there is a consolidation of some of the classes, Class (6) under the prior Act becomes Class (4), and there then appears a proviso as follows: "**And provided further**, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the Court." It will be noted that the Act of June 22, 1938, does not say "any **such** taxes," which, it might be contended, refers to taxes accruing against the bankrupt, but is unlimited in its terms—"in case any question arises as to the amount or legality of **any taxes**, such question shall be heard and determined by the Court."

And we would stress the fact that the amending Act of June 22, 1938, was enacted by Congress with the presumptive knowledge that the Courts, in the Wilkins case, **43 Fed. (2nd) 670**, decided by the Court of Appeals for the Fourth Circuit on September 19, 1930; in Dickinson v. Riley, 86 Fed. (2nd) 385, decided by the Eighth Circuit on November 19, 1936, and in the first St. Francis Levee District case, **91 Fed. (2nd) 118**, decided by the Eighth Circuit on June 28, 1937, with certiorari denied by this Court on November 22, 1937, had held that the amount and legality of taxes assessed against the Trustee as well as of taxes assessed against the bankrupt, prior to adjudication, should be heard and determined by the Bankruptcy Court whenever any question might arise in regard thereto.

The rule is well settled that "where a statute that has been construed by the Courts of last resort has been re-

enacted in same, or substantially the same, terms, the legislature is presumed to have been familiar with the construction and to have adopted it as a part of the law, unless a contrary intent clearly appears or a different construction is expressly provided for." 59 *Corpus Juris*, "Statutes," paragraph 625, pages 1061-1063.

> *Heald v. District of Columbia*, 254 U. S. 20, l. c. 23;
> *Johnson v. Manhattan Ry. Co.*, 289 U. S. 479, l. c. 500.

It is quite certain that the enactment of Section 64, in the amended Bankruptcy Act of June 22, 1938, in the light of the construction placed upon the corresponding section in the prior Act, in the decisions above cited (with no decision to the contrary), evidences an intent and purpose by Congress that the amount and legality of taxes assessed against a bankrupt estate, subsequent to the trustee acquiring title thereto, shall, when any question arises as to such taxes, be heard and determined by the Bankruptcy Court.

A. 2. Section 64a of the Bankruptcy Act Is a Part of Section 77 of That Act and Is Applicable to a Railroad Reorganization Proceeding.

This is in reply to point (2) in "Statement of the Questions Presented" on page 8 of the Petition for certiorari, and to petitioners' argument under head 3, on pages 9-12 of their original brief in support of petition, and also the supplemental brief filed on this same point.

At page 9 of their original brief, Counsel for petitioners quote Finletter on Bankruptcy Reorganization as expressing the opinion that Section 64a is excluded from application to a proceeding under Section 77. In this expression we respectfully submit that the learned author is in error.

One of the best and most convincing reasons for venturing to state that he is in error in this statement in his premise that the provision [in paragraph (1) of Section 77], "That 'in proceedings under this section and consistent with the provisions thereof' the rights of creditors shall be the same as if a voluntary petition had been filed and a decree entered thereon * * * is sufficient, it is believed, to exclude Section 64 from application to proceedings under Section 77 * * *." Upon the contrary, the provision quoted by Mr. Finletter, in connection with the corresponding provisions in Section 2 of Chapter X of the Bankruptcy Act (52 Stat., page 883), which deals with Corporate Reorganization (other than railroads), affords one of the strongest arguments for contending that Section 64a is to be regarded as a part of the railroad reorganization statute, and proceedings thereunder conducted in accordance with the requirements of Section 64a.

It will be recalled that both of these amendments to the Bankruptcy Act, Section 77, dealing with railroad reorganization, and the present Chapter X (originally Section 77B) dealing with Corporate Reorganization other than railroads, were enacted very close together, the former on March 3, 1933, and the latter on June 7, 1934, as parts of an effort on the part of Congress to afford relief to the industrial organizations of the Nation during a period of widespread financial distress.

As originally enacted, Section 77B (now Chapter X) provided in paragraph k that

> "If an order is entered directing the trustee or trustees to liquidate the estate * * * (5) debts shall be entitled to priority as provided in Section 64 * * * (but) none of the sections enumerated in this subdivision (k), except subdivisions (g), (i), (j) and

(m) of Section 57, and subdivisions (a) and (e) of Section 70, shall apply to proceedings instituted under this Section 77B **unless and until an order has been entered directing the trustee or trustees to liquidate the estate**" (48 Stat., at page 921).

As finally amended, in the Act of June 22, 1938, this provision is modified somewhat, and reads:

"Section 102. The provisions of Chapters I to VII, inclusive, of this Act shall, in so far as they are not inconsistent or in conflict with the provisions of this Chapter, apply in proceedings under this Chapter; **Provided, however,** That Section 23, subdivisions h and n of Section 57, **Section 64** (emphasis ours), and subdivision f of Section 70, shall not apply in such proceedings **unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of Chapters I to VII, inclusive**" (emphasis ours). 52 Stat., page 883.

Now, when we come to the railroad reorganization Section (77), we find that, in the original enactment, of March 3, 1933 (47 Stat., page 1481), paragraph (n) provides that

"In proceedings under this section, and consistent with the provisions thereof, the jurisdiction and powers of the Court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and his property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

This provision in Section 77 remains unchanged to the present time, except that in 1935 revision of this section (49 Stat., page 922), paragraph (n), as above quoted, appears as paragraph (1).

Now it is highly significant that, in these two statutes enacted for generally similar purposes, although dealing with different kinds of corporations, and so nearly at the same time, Section 64 is expressly excluded from operation in connection with Chapter X (formerly Section 77B) until there had been an order of liquidation, while, under Section 77, no such exclusion is made, but, on the contrary, all of the preceding provisions of the Act as to the jurisdiction and powers of the Court (including, because not excepted, Section 64) are made applicable thereto with the single proviso that such former provisions of the Act shall not be inconsistent with the provisions of Section 77.

Nor is there the slightest inconsistency between Section 64a and Section 77. Paragraph (c) (7) of Section 77 provides for the fixing, by the Bankruptcy Court, of a reasonable time for the filing of claims and for the classification of claims by the Court. As no other basis of classification is provided in Section 77, it is to be presumed that this shall be as provided in Section 64a. Assuming, as Petitioners contend, that taxes accruing during the trusteeship are to be placed in Class (1) as part of the necessary cost and expense of preserving the estate, the holders of claims in the subordinate classes are certainly very much concerned with the limitation of claims in Class (1) to a proper and legitimate basis, because provision will unquestionably be made, in the reorganization plan, for the payment of these several classes of claims either in cash, to the extent available, or in securities of some kind.

And while it is doubtless true, as Appellants contend, that there will be no liquidation in the sense of the ordinary bankruptcy, nevertheless the whole purpose of a reorganization under Section 77 would be frustrated if the property cannot be turned over to its ultimate owners,

upon final approval of the plan, with definitely known and valid liens, in such aggregate amount as the earnings of the property may enable it to carry. And the Bankruptcy Court is charged with the immediate supervision of the reorganization and the limiting of claims against the property to such claims as are valid and proper, and the classification of all claims according to law.

The object which Congress had in mind in the enactment of Section 77, and the nature of the public interest in a proceeding thereunder, are, very admirably, stated in *Continental Illinois National Bank & Trust Co. v. C. R. I. & P. Ry. Co.*, 294 U. S., at pages 671-672, as follows:

> "Section 77 advances another step in the direction of liberalizing the law on the subject of bankruptcies. Railroad corporations had been definitely excluded from the operation of the law in (June 25) 1910 (Chap. 412, Sec. 36, Stat. at L. 838, 839, U. S. C., Title 11, Sec. 22), probably because such corporations could not be liquidated in the ordinary way or by a distribution of assets. A railway is a unit; it cannot be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities cannot be halted because its continuous, uninterrupted operation is necessary in the public interest; and, for the preservation of that interest, as well as for the protection of the various private interests involved, reorganization was evidently regarded as the most feasible solution whenever the corporation had become 'insolvent or unable to meet its debts as they mature.'"

Consequently, the provisions of Section 64-a, as to the classification of claims and also as to the determination by the Bankruptcy Court of any disputed tax claims, are not only entirely consistent with the provisions of Section 77, but may fairly be said to be essential to the orderly administration thereof.

The error of Petitioners' argument, in their supplemental brief, is their assertion that because "Section 64a is a priority section, it is only applicable to liquidation." As we have already pointed out, Section 77, specifically provided for a classification of claims, especially where "there are substantial differences in priorities, claims or interests," and assuming, as Petitioners contend, that "ad valorem taxes imposed by the State of Arkansas on physical property within its borders constitutes a first lien on such properties * * * and is a part of the expense of administration" the holders of subordinate claims and the final determination of an acceptable plan of reorganization are alike interested in limiting the amount of these tax claims to such amount as may be legally due, as well as in the payment by the Trustee of all taxes which are legally due, Congress has committed the hearing and determination of the amount and legality of the tax claims, whenever any question arises in regard thereto, to the Bankruptcy Court, which is charged with the initial responsibility of passing on and, whenever necessary, classifying the claims, and with the final duty, subject to appellate review, of confirming or disapproving the plan of reorganization. And in sustaining the jurisdiction of the bankruptcy courts to hear and determine the amount and legality of disputed tax claims, the decisions of the Courts of Appeals uniformly hold that this shall be done with due regard to the pertinent provisions of the State Statute. See *Henderson County v. Wilkins, Dickinson v. Riley and St. Francis Levee District v. Kurn,* all cited, supra.

The two St. Francis Levee District cases (supra) involved a railroad reorganization under Section 77, and in each of them the United States Circuit Court of Appeals for the Eighth Circuit specifically upheld the right of the Bankruptcy Court, in which the reorganization proceed-

ings were pending, to hear and determine the amount or legality of disputed tax claims—by reason of the provisions of Section 64a of the Bankruptcy Act. And in each of those cases certiorari was denied by this Court.

A. 3. An Appeal to the Bankruptcy Court to Hear and Determine the Amount or Legality of the Disputed Taxes, Under the Provisions of Section 64a of the Bankruptcy Act, Such as the Petition of the Trustee in the Present Proceeding, Is Not Prohibited by Section 24 of the Judicial Code as Amended (28 U. S. C. A. 41).

This is in reply to point (3) in "Statement of the Questions Presented," on page 8 of the Petition for Certiorari.

The argument of Counsel for Petitioners, on this point, would seem to be presented, in part, under heading 5, on pages 15-16 of their brief in support of said petition; also, in part, under heading 2, on pages 5-9 of said brief, and in part under heading 1, on pages 4-5 thereof, wherein they endeavor to escape the effect of the decisions in the St. Francis Levee District cases, in the latter of which, 98 Fed. (2nd) 394, at page 397, it was expressly held that such a proceeding as this is not prohibited by the Act of Congress of August 21, 1937, which is the last amendment to Section 24 of the Judicial Code, and which is apparently the provision upon which Petitioners are chiefly relying.

As repeated references are made by Petitioners' brief to this section of the Code, as amended either by the Act of May 14, 1934 (48 Stat. 775), or by the Act of August 21, 1937 (50 Stat. 738), we will quote the essential provisions thereof, including the two amendments.

The entire section is somewhat lengthy, and the preliminary part thereof is in no way germane to the present

controversy. It commences "The district courts shall have original jurisdiction as follows:" It then sets forth certain classes of actions not at all related to the present controversy, and then proceeds as follows:

> "(A) Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such State." (B) "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

In the foregoing copy of Section 24 we have inserted the letters A and B. That part of the text following the letter A is the amendment of May 14, 1934 (48 Stat. 775), referred to by Counsel for Petitioners as "the Johnson Act," and that part which follows the letter B is the amendment of August 21, 1937 (50 Stat. 738).

Now, in the first place, an examination of the petition filed by the Trustee in the District Court, which is the basis of the present controversy, will show that it does

not seek "to enjoin, suspend or restrain" either "the enforcement, operation or execution of any order of an administrative board or commission of a State" (within the purview of the 1934 amendment) nor "the assessment, levy or collection of any tax imposed by or pursuant to the laws of any State," within the purview of the amendment of August 21, 1937.

The assessment as originally made by the Arkansas Corporation Commission was, according to the averments of the Trustee's petition (paragraph 5, R. 9), certified by that body to the County Assessors on December 5, 1939, the day after the Trustee's protest was overruled by that Commission. The Trustee, it is quite true, has refused to pay the taxes based upon said assessment, in their entirety—claiming that same are, in part, in violation of the Statutes and of the Constitution of Arkansas and also in violation of the Fourteenth Amendment. However, the Trustee, at no place in his petition asks for any injunctive relief, either against the Arkansas Corporation Commission or against the tax collectors of the fifty-one counties. They, or either of them, are not restrained by anything in the Trustee's petition, or in the order of the District Court, from taking any action which they might or could have taken had the Trustee's petition never been filed. It is perfectly true that the Bankruptcy Court would not, we assume, permit the railroad property under its custody, or that portion thereof located in Arkansas, to be sold under any alleged lien for the taxes based on the 1939 assessment. This power of the Bankruptcy Court has been very clearly and tersely stated by this Court, in an opinion by Mr. Justice Brandeis, in *Ex Parte Baldwin*, 291 U. S. 610, at page 616, as follows:

> "The inherent power of the Bankruptcy Court to protect its jurisdiction, over property of which it has taken possession, from interference by suit thereafter

begun in a State Court, has not been abridged by any legislation of Congress."

But, we repeat, this power of the Bankruptcy Court is not invoked in the Trustee's petition. The Bankruptcy Court may, and should, require the Trustee to pay all taxes which may be properly due, Federal, State, County or municipal. But the Bankruptcy Court may not, and should not, direct the Trustee to pay any disputed tax beyond the amount which that Court may find to be properly due. And the Trustee's petition in this case merely prays the Bankruptcy Court to hear and determine the amount and legality of the questioned tax—and that "this determination may be had without unnecessary delay" (paragraph 14 of petition, R. 18).

Such an appeal to the Bankruptcy Court was specifically declared, in *Henderson County v. Wilkins,* 43 Fed. (2nd) 670, at page 671, **not** to be a proceeding to enjoin action by the taxing authorities.

It will be further noted that the Johnson Act (48 Stat. 775) deprives the Federal District Courts of jurisdiction of suits "to enjoin, suspend or restrain the enforcement, operation or execution of any order of an administrative board or commission of a State" **only** where jurisdiction is based **solely** upon the ground of diversity of citizenship or the repugnance of such order to the Constitution of the United States—and in the petition of the Trustee to the District Court jurisdiction is not based upon either of those grounds, but instead is based upon the express provision of Section 64a of the Bankruptcy Act.

For reasons which are very clearly stated in *Board of Directors of St. Francis Levee District v. Kurn,* 98 Fed. (2nd) 394, at page 397, the remedy in the Courts of the State is not a full, complete and adequate remedy with

respect to tax claims against a railroad in reorganization under Section 77 of the Bankruptcy Act.

But even though an adequate remedy might be provided in the State courts, the jurisdiction conferred by Congress upon the Bankruptcy Courts, in dealing with claims against the property of a bankrupt or liens asserted against same, is exclusive. As was said by Mr. Justice Black in expressing the unanimous opinion of this Court in *Kalb v. Feuerstein*, 308 U. S. 433, at page 439:

> "The Constitution grants to Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, State or Federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law."

And in *New York v. Irving Trust Co.*, 288 U. S. 329, at page 332, this Court quoted with approval from a previous decision (Re Wood & Henderson, 210 U. S. 246, at page 254) as follows:

> "Congress has the right to establish a uniform system of bankruptcy throughout the United States and, having given jurisdiction to a particular District Court, to administer and distribute the property, it may in some proper way in such a case as this call upon all interested to appear and assert their rights."

And from another previous opinion of this Court, in *United States Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205, at page 217, as follows:

> "We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all

matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them."

And in *Ex parte Baldwin*, 291 U. S. 610, at page 615, this Court, in an unanimous opinion delivered by Mr. Justice Brandeis, says:

> "Having possession" (of the property of a bankrupt) "the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same (citing cases). **The jurisdiction in such cases is exclusive of the jurisdiction of other courts, although otherwise the controversy would be cognizable in them** (emphasis ours) (citing cases). In bankruptcy this rule applies regardless of whether the property is located in the district in which the bankruptcy proceeding originated."

The cases cited at page 8 of Petitioners' brief, i. e., *McLaughlin v. St. Louis & Southwestern Ry. Co.*, 232 Fed. 579, and *Missouri Pacific Railroad Co. v. Conway & Vilonia Road District*, 280 Fed. 401, did not involve bankruptcy proceedings at all, and are not in point upon the question at issue.

Section 64a of the Bankruptcy Act specifically provides "that in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the Court."

Prior to the enactment of this provision in its present form, in the Act of June 22, 1938 (52 Stat., at page 874), the corresponding provision in the former Act, which was

generally similar, although somewhat less comprehensive in terms, had been construed by the Courts, in the cases above cited, to apply to a reorganization under Section 77 and to confer upon the bankruptcy court exclusive jurisdiction to hear and determine the amount or legality of taxes imposed under a claim of statutory authority, even though there might be provision, under the State law, for a review and determination of such tax assessment in the Courts of the State.

Section 64a, in its present form, was enacted **after** the amendment of Section 24 of the Judicial Code in the Acts of May 14, 1934, and August 21, 1937, and Congress, having presumptive knowledge of the construction placed by the Courts upon the corresponding section in the prior law, is presumed to have adopted it with that construction in mind. Authorities in support of this rule of statutory construction are cited under the first head of this argument.

Consequently, as no exception or limitation appears in the enactment of Section 64a in its present form, the conclusion of the Circuit Court of Appeals in its opinion in this case (R. 50) that Section 24 of the Judicial Code, as amended, has no relation to the administration of the estates under the bankruptcy act," is clearly correct.

A. 4. The Petition of the Trustee as Filed in the Bankruptcy Court Presents a Justiciable Controversy.

The Trustee's petition alleges:

(a) In paragraph 4 of petition (R. 7) that according to the provisions of the Arkansas Statutes, the power to assess the property of the Trustee for taxation is vested in the Arkansas Corporation Commission, and that, according to said statutes, all property assessed by said Commission shall be on the basis of the true market value

thereof, but that (paragraphs 8, 9 and 10 of petition, R. 11-13) said Commission has adopted erroneous methods in arriving at the true market value of the railroad property, resulting in an assessment of $28,050,000 for the year in question, whereas the maximum proper assessment of said property for said year, determined in accordance with the statutory mandate, would not exceed $16,830,000.

It will be observed from Section 2048 of the Arkansas Statutes (set forth in appendix hereto) that the assessment of public utility property in that State is required to be made upon the unit basis, i. e., by first determining the System value of the entire property; then deducting therefrom the value of all property owned by the Company and not used in its business as a public utility, and then apportioning the remainder to the State of Arkansas by the use of a proper allocation factor. It will also be noted from paragraph 8 of the Trustee's petition (R. 8) that it is alleged that property in Arkansas is not assessed by the Commission at 100 per cent of its true market value, and that 40 per cent is the maximum per cent of full value at which other property is assessed by the Arkansas Corporation Commission, and that this per cent was used in the assessment of Trustee's properties in said State for the preceding year (1938).

A perusal of the petition will show that the errors complained of, in the assessment by the Arkansas Commission, were in the determination of System value, by methods which have been repeatedly criticized by the Courts as not proper for the determination of true market value—not only in tax cases but in other cases where the issue is with respect to such true market value.

The Trustee's petition alleged, and the Trustee has at all times stood ready to prove, that, due to general business conditions and to enormous increase in competition,

which has taken away a great amount of traffic from the Trustee's railroad properties, greatly impairing the value of the entire System, and rendering some portions thereof virtually valueless—thereby rendering original cost and cost of reproduction wholly unreliable determinants of value also, that upon the basis of fair and accurate methods for the determination of System value, and proper allocation thereof to the State of Arkansas, and the use of an equalization factor of 40 per cent, a correct assessment of Trustee's properties for said year should not exceed $16,830,000—whereas the assessment made by the Arkansas Corporation Commission was actually $28,-050,000.

An assessment based upon a determination of true market value which is very greatly in excess of the actual true market value of the property, prescribed by the State statute as the basis upon which assessment should be made, is clearly illegal, and relief should be granted in a case of which the Federal Court properly has jurisdiction, as it has of this case.

> *Henderson County v. Wilkins*, 43 Fed. (2nd) 670;
> *In re Gustav Schaefer Co.*, 103 Fed. (2nd) 237,

a decision of the United States Circuit Court of Appeals for the Sixth Circuit, in which the Court says:

> "This provision" (section 64a of the Bankruptcy Act) "is found in the Act of July 1, 1898, 30 Stat. 563, and courts have ruled with unanimity that the Bankruptcy Court is not irrevocably bound by an irrebuttable presumption of validity and correctness of the assessment made by the taxing authorities. The language of the Statute is plain that it is the duty of the Court to hear and determine whether the value at which the property of the bankrupt was assessed was proper and correct according to the local taxing statutes."

The case last cited involved the assessment of a manufacturing plant, located in Cleveland, Ohio. And we would add that much less is the Bankruptcy Court "irrevocably bound by an irrebuttable presumption of validity and correctness of the assessment made by the taxing authorities" in a case where, as here, the allegations of excessive assessment are based upon a grossly excessive valuation set by the State Commission upon an interstate railroad System operating in eight States.

(b) The petition alleges, in paragraph 13 (b) (R. 17-18), that the assessment would result in exacting from the Trustee as taxes on his properties in Arkansas an amount greatly in excess of the Trustee's fair and equitable share of the tax burden of said State, in violation of Section 5 of Article XVI of the Constitution of Arkansas. That section, so far as germane to this proceeding, provides as follows:

> "All property subject to taxation shall be taxed according to its value (2), that value to be ascertained in such manner as the General Assembly shall direct, **making the same equal and uniform throughout the State**, (b), no one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value * * *"

It will be noted that this provision is all comprehensive in its scope. It does not provide that all property of the same class or character shall be taxed on the same basis, but rather that "**all property subject to taxation** shall be taxed according to its value" and, further, that "no one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value."

Now, if it be proved, as the Trustee's petition alleges, that his property in Arkansas is being taxed, not accord-

ing to the true value thereof but rather on a basis very greatly in excess of its true market value, this fact not only establishes a direct violation of the mandate of the Constitution, but, in connection with the presumption that the taxing authorities are not likewise violating the mandate of the Constitution and of the Statutes in their assessment of property generally throughout the State, establishes a violation of Section 5 of Article XVI of the Constitution.

> *Chicago & Northwestern Ry. Co. v. Eveland,* 13 Fed. (2nd) 442, at pages 448-449.

Also *Bailey v. Megan,* 102 Fed. (2nd) 65, at page 67, wherein the Court of Appeals for the Eighth Circuit, after a thorough analysis of the evidence in that case, concluded that the railroad property had been assessed for taxation at a figure materially in excess of its true value in money, in violation of the Constitution and Statute of South Dakota, and, dealing with the question of discrimination, says:

> "So far as the issue of discrimination is concerned, we think there is no occasion to disturb the findings of the District Court to the effect that discrimination existed. The duty of the State authorities under the State laws was to assess property for not more than its full value. The presumption is that they obeyed the law, * * *. It is a fair assumption that the taxing authorities did not over assess the farms in the State."

In a proceeding over which the Federal Court has jurisdiction, an assessment for State taxation, found to be in violation of the Constitution of the assessing State, will be annulled.

> *Dawson v. Kentucky Distilleries Co.,* 255 U. S. 288.

At page 12 of their petition for certiorari, Counsel for Petitioners cite a decision of the Supreme Court of Arkansas, in *Rogers v. City of Rogers,* 174 Ark. 486 (295 S. W. Rep. 708), as authority for the proposition that a mere averment of discrimination without more specific statement of facts constituting the discrimination was insufficient. In that case, which involved an effort by the plaintiffs to enjoin the enforcement of an occupation tax imposed by the City of Rogers, plaintiffs proceeded to trial and final judgment in the Chancery Court, in which the decree was against them. Apparently no evidence was offered in support of a general allegation of discrimination under one section of the ordinance. Upon appeal to the Supreme Court, it was held that in the absence of a specific allegation and showing of facts, such a charge of discrimination could not be sustained, and the decree of the Chancery Court was affirmed.

If there be any merit in Petitioners' objection to the generality of the allegations of discrimination, in the Trustee's petition in the District Court, which we do not think there is, Petitioners' proper remedy would be by motion, in the District Court, to make the petition more definite, under Rule 12 (e) of the Rules of Civil Procedure for the District Courts of the United States, as adopted by this Court. Most certainly this objection, even though valid, does not warrant certiorari to the Court of Appeals, following an affirmance by the Court of an order of the District Court overruling a motion to dismiss the Trustee's petition.

(c) And in the third place, the Trustee's petition alleges, in paragraph 13 (b) (R. 18) that the discrimination against the Trustee, in the over-assessment of his properties, has been arbitrary, persistent and has been practiced over a period of years, with the result of imposing upon the Debtor and upon the Trustee an undue and

disproportionate share of the taxes in the State of Arkansas, in violation of the Fourteenth Amendment to the Federal Constitution.

Counsel for Petitioners, at page 13 of their petition contend that the decision of this Court in *Nashville, Chattanooga & St. Louis Railway v. Browning,* 310 U. S. 362, renders untenable the allegation of a violation of the due process clause of the Fourteenth Amendment.

As we read the opinion in the Browning case, it does nothing of the sort. It appears from that opinion that there is nothing, in the Constitution or Statutes of Tennessee prohibiting the application of different yardsticks of value to different classes of property, and this Court points out that the petitioner in the Browning case (the railway Company) makes no claim that its property is singled out from among other public service corporations for discrimination. The opinion in that case also refers (page 317) to the previous decision of this Court in *Great Northern Railway v. Weeks,* 297 U. S. 135, as stand ing alone in striking down "**a nondiscriminatory assessment** simply because it was thought excessive."

But in the present case, as has been pointed out, the Constitution of Arkansas specifically prohibits the application of different yardsticks of value for different classes of property. It prescribes true value for all alike, and the statute prescribes this same basis of value, with even greater particularity, for railroad property and other property assessed by the Arkansas Corporation Commission. And in the absence of any constitutional or statutory warrant for such procedure, to assess the Trustee's properties at a figure vastly in excess of their true market value and thereby impose upon the Trustee an undue and disproportionate share of the tax burden, as compared with other property in the State, would certainly appear

to constitute a violation of the Fourteenth Amendment. Such has been the holding of this Court in numerous cases. Thus, in *Kansas City Southern Ry. Co. v. Road Improvement District No. 6*, 256 U. S. 658, it was held, in a unanimous opinion, that (page 661):

> "Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all,"

and, also, in

> *Road Improvement District No. 1 v. Missouri Pacific R. R. Co.*, 274 U. S. 188, at page 194,

wherein it was held that

> "Our conclusion is that the assessment against the railroad in unreasonably discriminatory in so far as it is based on personal property, and in this respect violates the equal protection clause of the Fourteenth Amendment, and it is otherwise so excessive as to be a manifest arbitrary exaction and in violation of the due process of law clause of the same Amendment.

We would remark, however, that, wholly apart from the allegation of a violation of the Fourteenth Amendment, the averments in the Trustee's petition, as to the assessment being in violation of the Statutes and of the Constitution of Arkansas, present a justiciable controversy, calling for consideration and determination by the Bankruptcy Court under the provisions of Section 64a of the Bankruptcy Act.

B. The Petition for Certiorari Should Be Denied Because the Granting of Such Writ Is Solely a Matter of Sound Judicial Discretion, and the Facts Presented Do Not Bring This Case Within the Classes of Cases Calling for the Exercise of Such Discretion, as Set Forth in Paragraph 5 of Rule 38 of the Rules of This Court.

The decision of the Circuit Court of Appeals most certainly does not fall within any of the classes of cases described in paragraph 5 (b) of Rule 38. It is directly in line with the decisions of the same Court in the two St. Francis Levee District cases (supra), in each of which this Court denied certiorari. Petitioners, at pages 4-5 of their brief, seek to distinguish those cases upon the ground that they did not involve any taxes imposed by the State or its political subdivisions. Be that as it may, Section 24 of the Judicial Code, as amended by the Act of August 21, 1937, upon which Petitioners are relying, refers to "any tax imposed by or pursuant to the laws of any State," and most certainly the District officials must have contended that the levee taxes involved in the St. Francis Levee District cases complied with that description—otherwise they possessed no validity whatever. These levee assessments are described in the Arkansas statutes (Section 4465, Pope's Digest, 1937) as taxes; they are referred to throughout the opinions of the Court of Appeals as taxes, and they comply with the definition of "taxes" approved by this Court in *New Jersey v. Anderson*, 203 U. S. 483, at page 492, i. e., "* * * imposts levied for the support of the Government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement."

The decisions in the two St. Francis Levee District cases are directly in point in the present proceeding.

So far as concerns the "adequacy" of an appeal from

the Arkansas Corporation Commission to the Pulaski Circuit Court, to which Petitioners refer at page 5 of their petition for certiorari, and at page 4 of their brief, such appeal would most certainly be no more "adequate" than the right of the Trustee to defend the suits pending in the State Courts, which were considered in the two St. Francis Levee District cases.

Furthermore, Section 2019 of the Arkansas Statutes, to which Petitioners refer, provides that such appeal shall be taken within thirty days after the entry of the record of the Arkansas Corporation Commission. As is alleged in paragraph 5 of the Trustee's petition (R. 9), the final order of the Commission was entered on December 4, 1939, and on December 5, 1939, the assessment so made was certified by the Commission to the Assessors of the fifty-one counties in Arkansas in which the Trustee's property is located. Passing by the question as to the adequacy of an appeal to the Pulaski Circuit Court to remove the tax liens in these fifty-one counties, as to which there is grave doubt, it is, of course, perfectly obvious that the time for such appeal has long expired, and Petitioners are now seeking to escape any judicial review of the assessment made by the Arkansas Corporation Commission.

None of the decisions cited by Petitioners, in their petition or in either of their two briefs, are at variance, as to any of the jurisdictional points involved in the motion to dismiss the Trustee's petition, with the opinion of the Court of Appeals herein.

Furthermore, as was pointed out in our opening statement, this proceeding involves an appeal from a purely interlocutory order of the District Court. Neither the decision of that Court nor the decision of the Court of Appeals involves the ultimate merits of the case in any way whatever. Under the decision of the Court of Appeals, the

District Court is left free to hear and determine the amount or legality of the disputed taxes, as that Court is required to do by Section 64a of the Bankruptcy Act.

As has been held by this Court in several cases, a writ of certiorari will not, except in extraordinary circumstances, be issued until final decree.

> *American Construction Company v. Jacksonville, Tampa and Key West Ry. Co.,* 148 U. S. 372, l. c. 385;
> *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U. S. 251, at page 258.

It is respectfully submitted that the writ of certiorari should be denied.

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APPENDIX.

Section 2048, Arkansas Statutes.

(Pope's Digest of Statutes of Arkansas for 1937.)

Section 2048. **Apportionment of Assessed Value.** The Commission shall assign or apportion the assessed value of the property of all persons, firms, companies, co-partnerships, associations and corporations, which it is required to assess, in the following manner:

There shall be deducted from the true market or actual value of the entire property, tangible and intangible, ascertained as in this Act provided, the true market or actual value, as ascertained from the information furnished by report, or otherwise, of all real and personal property of such company not used in its business as a public utility, and the remainder shall be treated as the true market or actual value of all its property, tangible and intangible, actually used or employed in its public utility business.

The Commission shall then ascertain and fix the value of the total utility operating property, tangible and intangible, in this State, by taking such proportion of the true market or actual value of the entire operating property, tangible and intangible, of such company, actually used in its public utility business, as its total lines within this State bear to the total lines both within and without this State, or as its total receipts or income from operation within this State bear to its total receipts or income from operation both within and without this State, or by using such other recognized method, or combination of methods, as will, in the judgment of the Commission, result in a just and equitable apportionment to this State of its due proportion of the value of the total utility operating property.

When the value of the total utility operating property,

tangible and intangible, in this State has been determined; or when the property and operations of such company is wholly within this State, there shall be assigned or apportioned to the several counties, towns, school districts and other taxing districts through or in which such company operates the value of all real estate and all tangible personal property which had a fixed situs therein on the first day of January of the current tax year; and the remaining part of the assessment, if any, shall be assigned or apportioned among the several taxing districts in proportion to the value of the tangible property assigned or apportioned thereto. Provided, that the value assigned to rolling stock of street, suburban or interurban railroad, railroad and bus line companies shall be apportioned among the several counties, towns and school districts through or in which such company operates in proportion to the mileage operated therein, and provided, further, that the value of the personal property of any express or sleeping car company shall be apportioned among the several counties, towns, and school districts through or in which such company operates in proportion to the mileage operated therein.

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